



December 21, 2008

Mr. R. Matthew Priest  
Chairman  
Committee for the Implementation of Textile Agreements  
Room 3001  
Department of Commerce  
14th Street and Constitution Avenue, N.W.  
Washington, DC 20230

**Re: Request for Public Comment on the Due Diligence Requirement  
Under the Commercial Availability Procedures of the Dominican  
Republic-Central America-United States Free Trade Agreement  
(CAFTA-DR)**

**PUBLIC VERSION**

Dear Mr. Chairman:

We write in response to the Request for Public Comment on the Due Diligence Requirement Under the Commercial Availability Procedures of the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR) published at 72 FR 67916. As the trade associations representing the domestic U.S. textile industry we welcome this opportunity to comment on the concerns CITA has raised with regard to the CAFTA-DR Commercial Availability Due Diligence.

During the CAFTA-DR negotiations, offshore apparel and importing interests sought a major revamping of the "NAFTA" short supply model. The revamped model included in CAFTA-DR clearly benefits importing, retailing and offshore interests by substantially expediting the process and incorporating new concepts that facilitate approvals such as restricted-quantity short supply designations. Compared to the NAFTA-type provisions in previous free trade agreements, the CAFTA-DR commercial availability process also significantly weakens the standards by which petitions are evaluated, making it much easier for products to be granted short supply designations. As a result, the CAFTA-DR process represents a major concession on the part of the domestic textile industry and one which was agreed to in good faith in an effort to maximize benefits under the CAFTA-DR.

During the CAFTA-DR negotiations, all parties expressed concerns about efforts by unscrupulous parties to file or contest future short supply petitions for spurious reasons. To address this problem, negotiators devised a system that would essentially equate petitions to effective offers to buy and responses to effective offers to supply. This system was aimed at replicating normal business transactions between actual apparel makers and textile producers. However, with more than a year of practical experience, we have seen the process devolve into a mechanism for undermining the basic intent of the commercial availability process through gerrymandered fabric constructions and a superficial due diligence process.

While we believe that CITA attempted to set out reasonable procedures to implement the CAFTA-DR short supply provisions, we have identified a number of issues of serious concern that we strongly believe warrant revision under CITA's procedures governing this program.

### **1. Communications between Requesters and Potential Suppliers:**

CONCERN: In return for allowing expedited decisions on a weakened evaluation standard, the CAFTA-DR model was supposed to establish an exhaustive due diligence process that was designed to match actual buyers with sellers. To the contrary, the due-diligence process has proven to be particularly superficial and problematic. Instead of direct interaction between actual buyers and sellers, law/consulting firms have often interjected themselves to a point where they serve as the only point of contact for what in many cases is an unnamed "potential customer." One line emails from law firms asking if a certain fabric can be produced do not serve as a legitimate substitute for direct meetings between potential customers and suppliers.

It is also disconcerting for companies to be contacted by law/consulting firms asking detailed questions about their manufacturing capabilities when it is unclear the exact nature of their inquiries. For example, one law firm's standard response form asks companies for such extensive information as square footage of factory production, numbers and types of weaving machines, description and capacity of piece dyeing, yarn dyeing and printing facilities and equipment, number of employees at manufacturing facilities and monthly or annual production capacity. Such excessive demands for unnecessary information create a major disincentive for potential suppliers in terms of responding to inquiries.

Under a sincere due diligence process, CITA's procedures must require direct interaction between actual buyers and sellers. These meetings should involve the normal back and forth between the two parties to arrive at the exact product specifications, sample requirements, delivery timelines, etc. In addition, these discussions should go beyond the actual fabric or yarn in question and entail a review of suitable substitutes that could service the customer's needs.

While it may not be feasible to meet directly with all potential suppliers in the CAFTA-DR region, it remains critical that extensive due diligence inquiries take place with regard to suppliers in the entire region. When regional producers are left out of the due diligence process, a lot of time can be expended by U.S. suppliers only to have the dynamic change in the petition phase when a regional supplier from outside the United States files a response. CITA should require petitioners to conduct the same extensive level of due diligence with potential suppliers both in the United States and other CAFTA-DR countries.

Only through such a comprehensive due diligence process with the direct involvement of actual buyers can the original intent of the CAFTA-DR short supply process be satisfied.

#### RECOMMENDATIONS:

CITA should require petitioners to prove with detailed reporting who has been contacted for product sourcing inquiries. Along these lines, it is crucial that individual companies be contacted by additional means beyond e-mail. Electronic notification is unreliable at best and often has no back-up delivery method within a company if the person is not available, no longer with the company, or does not read e-mails regularly.

CONCERN: Since responses must be offers to supply, many affected parties are excluded from participating in the process. On numerous occasions, fiber and yarn spinners have not been able to comment on fabric petitions and many greige fabric manufactures have not responded when a finish is specified. As associations, we attempt to bring all the sectors of the supply chain together to provide petitioners the desired product, but CITA is not fully apprised of this. As a result, the offer to supply does not provide all the information necessary for CITA to make a fully-informed decision.

#### RECOMMENDATION:

CITA should consider information from all manufacturers participating in the process.

CONCERN: The expedited timeline for consideration of a CAFTA-DR Commercial Availability Request places a burden on potential suppliers to respond to filings promptly, within a matter of a few days. Mindful that:

The intent of the CAFTA-DR Commercial Availability Procedures is to foster the use of U.S. and CAFTA-DR products by implementing procedures that allow products to be placed on or removed from a product list, on a timely basis, and in a manner that is consistent with normal business practice [...].” (**Interim Procedures for Considering Requests Under the Commercial Availability Provision to the Dominican Republic-Central America-United States Free Trade Agreement**, published at 71 FR 9315, emphasis added).

We note that it is normal business practice in the United States and our CAFTA-DR partners for firms to close down for at least Christmas and New Years and, in many cases, for the week containing the July Fourth Independence Day holiday. Furthermore, many of the key personnel who normally respond to Commercial Availability Requests take off additional time around those holidays and are unavailable to monitor and respond to such requests. As a result, we note that it is impractical to expect full responses from interested parties around the holidays.

#### RECOMMENDATION:

CITA should not accept CAFTA-DR Commercial Availability Requests during the period from December 10 through December 31 and during the week containing the Fourth of July.

## **2. Identification of Potential Suppliers:**

CONCERN: Law/consulting firms acting on behalf of their clients appear to be largely depending on domestic trade associations to conduct their due diligence for them. While it is important to make trade associations aware of potential filings, working primarily through trade associations has various flaws. Trade associations are often not aware of members' exact product lines and production capabilities, and contact through associations circumvents the desired dynamic of actual buyers and sellers communicating directly. We have also noted that on occasion, not all of the companies recommended by the trade associations are contacted. Furthermore, trade associations do not represent the entirety of the U.S. textile production base. In a recent filing concerning textured polyester, textile companies which were members of the trade associations that were contacted by the petitioner only represented ten out of nearly 60 textile companies listed in Davison's Textile Blue Book as making textured polyester.

#### RECOMMENDATIONS:

1. CITA should require that petitioners contact U.S. and CAFTA-DR producers directly, in addition to informing trade associations, and should verify their due diligence efforts by comparing producers listed in Davison's or any other comprehensive database of CAFTA-DR and U.S. producers. There are numerous Buyers' Guides and Specifiers' Guides available which offer specific contact and product information beyond the general information that can be supplied by trade associations.
2. The Department of Commerce should conduct an annual survey of U.S. textile manufacturers so as to construct a database of that could serve as an initial due diligence starting point for potential petitioners.
3. We would also recommend that the Commerce Department establish a Technical Advisory Committee, perhaps made up of retired textile executives, to advise CITA on technical issues regarding short supply petitions and textile processes.

### **3. Content of Communications between Requesters and Potential Suppliers:**

CONCERN: Law/consulting firms acting on behalf of their clients have used information gained in the due diligence process to engineer overly-complex product descriptions which purposely include production techniques that are outdated and no longer prevalent in the United States. In the guise of due diligence, these inquiries appear to be looking for minor loopholes to trigger a case.

Short supply determinations should be made on the major defining characteristics of a fabric or yarn in question. The process is undermined when undue emphasis is placed on minor and completely unenforceable specifications. Doing so allows a petitioner to gerrymander product descriptions so as to ensure that no one can, or will, supply the good in question. Specifically, we believe that some of the petitions filed recently have been overly technical for the purpose of discouraging a response from the domestic industry.

For example, potential suppliers do not know how to address requirements for certain specifications when no standard testing method is referenced to certify that goods match the specifications in the petitions. Among others, ASTM and AATCC have numerous widely-recognized testing methods and procedures used in labs throughout the country and around the world. In addition, some petitions have gone a step beyond product specifications and also outlined specific production techniques, such as roller-printing. This is problematic because there are usually numerous ways to achieve the same final effect, and technology is constantly being updated making some production methods obsolete.

Such unnecessary levels of detail again have the effect of creating confusion and discouraging manufacturers from submitting offers to supply. Often times these ancillary factors have no bearing on whether a like product is directly substitutable. Along these lines, the industry also believes that some petitions have included details that exceed “industry standards” in the United States or elsewhere in the world. For example, if the standard residual shrinkage for a pair of trousers is 2-3 percent, no specification for one percent should even be considered. Foreign goods will not meet the standard in the petition either. In this regard, the Worth Street Rules have been the standard reference for decades in establishing industry standards. Finally, it is ludicrous to ask U.S. Customs to attempt to enforce a short supply designation on factors that they cannot readily detect.

Uncertainty is also created when multiple items in a single petition are requested. For example, some petitions contain vague requirements such as “various weaves” or large ranges with regard to product specifications. A separate petition should be filed for each of these various weaves needed by the petitioner. Such ambiguities lead to confusion on the part of legitimate potential suppliers often resulting in reluctance to respond.

#### **RECOMMENDATIONS:**

1. Major defining characteristics should be limited to: Construction – Woven / Knitted / Other Constructions, Yarn/Fiber Definition and Content Fabric Width Fabric Finish

2. We strongly recommend that CITA issue a procedural clarification stipulating that decisions will be based on the major characteristics of the products in question when evaluating petitions and petitioner claims. The major characteristics for each of the above inputs should be included as should the end product and end market.

3. Major defining characteristics must conform to standard yarn/fabric/finishing specifications. This should include yarn size, construction, weave or knit pattern, dyeing specifications, finishing specifications and other relevant information. Specifications should be defined under existing ASTM or AATCC specifications. No petition should invent its own test requirements. Instead, specifications should be “to industry standards.”

CONCERN: The integrity of this program depends on the ability to make certain that only those items that have been legitimately designated for short supply receive duty free treatment. As discussed above in the product definition section, this would preclude CITA from approving any petition on the basis of a specification that is not readily detectable and therefore is unenforceable by the U.S. government.

#### RECOMMENDATIONS:

1. CITA in conjunction with Customs should undertake a specific enforcement plan designed to ensure that products granted short supply treatment actually meet the specifications outlined in the approved petition.

2. We recommend random testing in independent or government laboratories of goods shipped under the commercial availability provisions to ensure that they match the specifications in the petition.

CONCERN: While meetings with CITA and petitioners are helpful, they can be expensive and time consuming for responding companies. This also serves as a barrier to effective industry participation.

In addition, our members have expressed concern over the issue of providing samples during these meetings. It is unreasonable and outside of normal business practices to ask companies to run expensive samples of complex fabrics before they receive a serious offer to buy or have detailed discussions with the potential customer. Adoption of the due diligence clarifications described above would resolve this problem.

#### RECOMMENDATION:

Allowing for these meetings to be done via conference call would be one possible improvement.

#### **4. Substitutability of Products:**

CONCERN: The discussion in Section 3 pertaining to overly-complex product descriptions designed to confuse and discourage responses carries over to the issue of substitutability. If petitions are filed and decisions are made based on the major defining characteristics of a products and using standard testing methods, then substitutability is also addressed.

#### **RECOMMENDATION:**

Adopt the previous recommendations pertaining to product definitions.

CONCERN: A refusal to consider substitutable products might have more to do with price than availability or might be subjective in nature.

#### **RECOMMENDATION:**

In such cases, we recommend that the Technical Advisory Committee discussed above (Point 2) assist CITA in determining whether goods are truly substitutable. Such a committee comprised of retired textile executives would have the expertise to make such a judgment from an objective technical perspective without owing allegiance to any of the parties involved with the petition in question.

#### **5. Commercial Availability of a Production Input vs. Downstream Product**

CONCERN: A request actually is for a downstream product, but it is a production input whose commercial availability is in question. For example, recent petitions have sought short supply designation for fabrics that are well within the production capability of U.S. manufacturers except for the possibility that a specific yarn or fiber is not available domestically. In such cases, U.S. fabric producers are uncertain of how to respond and risk being bypassed in the process. Furthermore, this type of information should have become evident to the petitioners during the due diligence process. The more appropriate course of action would be to seek a short supply determination on the yarn or fiber in question. Again, this would be in keeping with the original intent of the new CAFTA-DR commercial availability process, which was never intended to allow for schemes that would circumvent fabrics that could be readily produced in the United States.

#### **RECOMMENDATIONS:**

1. We recommend that petitions be required to specifically stipulate why they believe a product is in short supply.
2. We strongly urge CITA to, upon receipt, reject from consideration under the Commercial Availability Procedures of CAFTA any petition that seeks short supply

designation on a downstream product by leapfrogging the actual component that may be unavailable.

3. If in the course of CITA investigation of a petitions CITA finds that regional producers have presented evidence showing that the subject product would be commercially available but for the lack of specific upstream inputs such as fibers or yarns CITA should deny the petition and advised the petitioners that they may reapply for a determination without prejudice on the actual component they contend is in short supply.

## **6. Potential Suppliers' Responses to Requester's Inquiry**

CONCERN: Textile producers are given a short period of time to respond to requests from petitioners. However, the nature of the request is sometimes unclear, rendering impossible a clear and detailed response.

### **RECOMMENDATION:**

Require petitions or product requests during the due diligence process to be based on recognized industry standards and utilize standard terms and descriptions.

CONCERN: Some petitioners have expressed concern that the reticence of textile companies to divulge details of their businesses, including capacity and current or recent production, represents bad faith in responding to petitions. However, this often is more a matter of refusing to allow competitors to know production capabilities, product mixes, and propriety products developed in coordination with specific customers. Concern about sharing such information has prevented some companies from responding to petitions during the last year.

### **RECOMMENDATION:**

Allow this information to be submitted on a business confidential basis, but only require information that is relevant to the petition at hand. We note that most petitions receive few, if any, objections.

CONCERN: Requiring a company to demonstrate that they have produced the subject product within the last 24 months is arbitrary and largely irrelevant. Product mixes change on a regular basis due to customer demand and consumer preferences. Styles might not reemerge for many years. A case in point is rayon, which has only recently become popular again on a fairly large scale. Furthermore, US textile companies today are expending vast sums of money and effort in product development. New products and innovations are the norm. Most textile companies today are making goods today that were not in their product mixes 24 months ago. Also, with the highly complex product definitions that have been included in numerous petitions, it is unreasonable to require



that companies have produced the product in the past 24 months. Doing so creates additional incentives for petitioners to draw up unreasonable product descriptions.

**RECOMMENDATION:**

Do not require respondents to show production of the product within the last 24 months. Revisions to CITA's procedures to ensure that product definitions include only major defining characteristics would help alleviate concerns with substitutability. With definitions to industry standards, it will be much easier to discern when a potential supplier can in fact make the product in question.

**7. Effective Use of Limited-Quantity Approvals:**

CONCERN: To fully realize the intent and benefits of the process, petitioners must also identify the quantity of the good they require. If a vertical producer is found to manufacture the good, or if goods are not manufactured in sufficient quantities, CITA must exercise its authority to limit the allowable quantities to reflect that fact. In at least one case, CITA did not use this option and the result was detrimental to companies which were producing the good in the United States.

**RECOMMENDATION:**

CITA should not issue unrestricted approvals when U.S. sources exist. When domestic suppliers cannot provide the full quantity requested, an approval (if otherwise warranted) should be issued for a limited quantity reflective of U.S. availability.

**8. Conclusion:**

Overall, the CAFTA-DR commercial availability should function as an enhancement to the workability of CAFTA-DR and not as a means to undermine the rules of origin. The industry has worked diligently to abide by the rules under the short supply process. We want and need CAFTA-DR to work properly, and we seek to work in partnership with apparel and retail customers.

In return we ask that CITA develop a system that sustains the original intent of the CAFTA-DR commercial availability process. As a result, CITA will need to revise its procedures to ensure that:

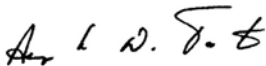
1. A company has conducted extensive due diligence including direct meetings with potential suppliers before filing a formal petition;
2. Petitions are submitted and decided upon based on the major characteristics of the product in question;

3. Petitions are based on the component item that may be in short supply as opposed to downstream products; and

4. Petitions based on unenforceable specifications and production techniques are rejected from the outset.

Thank you for your consideration of these comments. We look forward to working with CITA to improve the CAFTA-DR commercial availability process.

Sincerely,



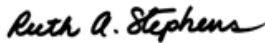
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